

INITIAL STATEMENT OF REASONS

PRIVATE SITE MANAGEMENT PERFORMANCE STANDARDS

This rulemaking affects title 22, the California Code of Regulations, chapter 51, by adding sections 69000 through 69013. These regulations establish minimum performance standards for private site managers and private site management team members who are authorized to conduct site investigations and removal and remedial actions pursuant to the Department of Toxic Substances Control's (DTSC's) Private Site Management Program.

EFFORT TO AVOID DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS

At this time, there is no equivalent federal program that this regulation would conflict with or duplicate.

STUDIES RELIED ON

In 1992, the State of Massachusetts established a similar voluntary cleanup program using licensed professionals to cleanup hazardous waste sites. DTSC reviewed Massachusetts' regulations called the "Rules of Professional Conduct," under the provision of Massachusetts' General Laws, chapter 30A, section 6 and chapter 233, section 75 (309 CMR 1.00 - 8.00). However, DTSC did not strictly model the performance standards on the Massachusetts' program because the requirements in chapters 6.8 and 6.85 of the Health and Safety Code are substantially different.

A draft Notice of Exemption under the California Environmental Quality Act is available for review with the rulemaking file and will be filed with the State Clearinghouse when the regulations are adopted.

ALTERNATIVES CONSIDERED

DTSC did not pursue any alternatives other than developing regulations. Health and Safety Code section 25395.15 is clear in its intent that regulations are necessary to implement the Private Site Management Program. There is no other viable alternative for establishing performance standards that provides an opportunity for public review and comment.

DTSC issued a notice proposing to adopt Private Site Management regulations on December 3, 1999. A public hearing was held on January 18, 2000, to obtain comments from the public. Because final regulations were not adopted within one year of publication of the first notice, DTSC is issuing a new notice of proposed adoption.

Comments received at the January 18, 2000 meeting were considered for inclusion in this version of the proposed regulations. DTSC will be holding a 45-day public hearing as part of this rulemaking filing.

DETAILED STATEMENT OF REASON

In some instances, these proposed regulations duplicate statutory provisions in the Private Site Management Program (statutes 1995, chapter 820); however, such duplication is necessary to meet the clarity standard of review. The duplication is necessary to put regulatory requirements into context and to ensure that project proponents and members of the public have easy access to performance standards.

The following paragraphs provide an explanation of the necessity for each section of the regulations:

Section 69000. Purpose: This section is necessary to explain that the purpose of these proposed regulations is to establish minimum standards of performance for activities and conduct of private site managers and members of private site management teams.

Section 69000.5. Definitions: This section provides definitions that are applicable to the Private Site Management Program. This is a voluntary program that allows a new class of professionals to conduct site investigations and removal and remedial actions at low-threat sites. These definitions are necessary for the operation of this program and for assuring that private site managers and private site management team members meet the minimum performance requirements.

- (a) The term “Administrative Record” refers to all of the documents that were relied on or considered when a private site manager or members of the private site management team prepared a removal action workplan or a remedial action plan pursuant to Health and Safety Code section 25395.5. Additionally, Health and Safety Code section 25395.11 requires that private site managers and members of a private site management team comply with the provisions of chapter 6.8 or chapter 6.85 of division 20 of the Health and Safety Code, which require the creation of an administrative record. The requirement to prepare an administrative record is in Health and Safety Code section 25357.5, which limits judicial review to the administrative record of any issues concerning the adequacy of any response action taken or ordered by DTSC. The administrative record is also used as a way for the public to review and participate in the selection of the response action by providing access to the documents and information that were considered or relied on in the decision-making process.
- (b) The term “Administrative Record List” means the list of documents that must be maintained by the private site manager to specify the contents of the administrative record. The administrative record list is the method for listing those documents that were considered in the remedy selection document and including the list with the

removal action workplan or the remedial action plan.

- (c) The term “Application Package” refers to all documentation that is part of applying for this program. This definition is necessary so that applicants understand there is not a single application document.
- (d) The term “Article 8” refers to article 8, of chapter 6.8, division 20 of the Health and Safety Code. Article 8 establishes the Private Site Management Program.
- (e) The term “CEQA” means the California Environmental Quality Act in the Public Resources Code sections 21000-21178, and the California Code of Regulations, title 14, section 15000-15387.
- (f) “Chapter 6.5,” “Chapter 6.66,” “Chapter 6.8,” and “Chapter 6.85” mean chapters 6.5, 6.66, 6.8 and 6.85 respectively, of division 20 of the Health and Safety Code.
- (g) The term “Department” is defined so anyone reading the regulations understands it only refers to the Department of Toxic Substances Control.
- (h) The term “EIR” is defined so the acronym for the environmental impact report is understood by those reading the regulations.
- (i) The term “FS” means feasibility study. A feasibility study means the identification and evaluation of technically feasible and effective remedial action alternatives to protect public health and the environment, at a hazardous substance release site, or other activities deemed necessary by the Department for the development of a remedial action plan.
- (j) The term “Independent” is defined to clarify the requirements of subsection (d) of section 25395.1 of the Health and Safety Code.
- (k) The term “Initial Study” is defined to as it pertains to these regulations.
- (l) The term “Land Use Controls” is necessary to describe any easement, covenant, restriction, or servitude or combination, as appropriate, that prohibits certain land uses or restricts certain activities on a site, signed by DTSC and the landowner and recorded with the county where the land is located. All land use controls shall run with the land pursuant to Civil Code section 1471 and sections 25202.5, or 25222.1, or 25355.5 subdivision (a)(1)(C), or section 25398.7 of the Health and Safety Code and shall continue in perpetuity unless modified or terminated in accordance with applicable law.

- (m) The term “Material Deviation” is defined so that DTSC can determine if a substantial or significant change may impact a remedy selected in a removal action workplan or remedial action plan, and if the change would require a public notice and comment period to allow the affected community to review and comment on the change. Even though a site is accepted into the Private Site Management Program, DTSC must be able to take or require that certain actions be taken to prevent a hazardous substance release from endangering public health, welfare, or the environment. In addition, the term “Material Deviation” is defined to clarify that Health and Safety Code section 25395.13 prohibits private site managers and members of a private site management team from making materially false or inaccurate statements in any application, record, report, certification, plan, design, or statement that the private site manager or the team member submits to DTSC.
- (n) The term “OEHHA” is necessary to clarify that the Office of Environmental Health Hazard Assessment (OEHHA) is the State agency that has adopted regulations that establish the registration criteria for the Registered Environmental Assessor-Class II (REA II). DTSC is required by Health and Safety Code section 25395.12 to report any audit findings to OEHHA whenever a private site manager or private site management team fails to meet the minimum performance standards.
- (o) The term “O&M” refers to operation and maintenance work to be done following remediation action at a site. O&M is necessary to protect public health or safety or the environment, to maintain the effectiveness of the response action at the site, or to achieve or maintain the response action standards and objectives established by the final remedial action plan or final removal action workplan applicable to the site.
- (p) The term “PEA” means preliminary environmental assessment. This term is defined by Health and Safety Code section 25319.5.
- (q) The term “Private Site Management Program” is defined to help those reading the regulations to understand the scope of the program. This is a voluntary program.
- (r) The term “Private Site Management Program Agreement” refers to the specific agreement that would be developed when a project proponent enters the Private Site Management Program.
- (s) The term “Private Site Management Team” is defined to clarify the requirements in subsection(b) of section 25395.1 of the Health and Safety Code. Members of the Private Site Management Team are professionals whose actions are coordinated by the Private Site Manager.
- (t) The term “Private Site Manager” means the individual who is overseeing a site cleanup and is a Registered Environmental Assessor – Class II. It has been determined that the Class II level Assessor has the needed experience to function without close oversight by DTSC.

- (u) The term “Project Proponent” is defined to clarify that someone other than the site owner or the person responsible for a hazardous substance release may be eligible to enter into a Private Site Management Program agreement as a project proponent.
- (v) The term “RAP” is an acronym for the remedial action plan required in accordance with all requirements of Chapter 6 .8 or Chapter 6.85 for sites selected.
- (w) The term “RAW” is an acronym for the remedial action workplan.
- (x) “Reasonable Costs” refers to costs incurred by DTSC in order to carry out work in accordance with chapters 6.5, 6.66, 6.8, and 6.85, division 20 of the Health and Safety Code.
- (y) The term “RI” is an acronym for remedial investigation.

Section 69001. Performance Standards: This section establishes the minimum requirements that private site managers must follow when conducting all activities pursuant to the Private Site Management Program. Private site managers are responsible for selecting private site management team members who possess the necessary skills, work experience, licenses, and appropriate insurance for performing site cleanup activities as specified in Health and Safety Code section 25395.4.

Private site managers and private site management team members are required to follow all applicable federal, State, and local laws and regulations in order to ensure those site cleanup actions are protective of public health and safety and the environment. Private site managers and private site management team members are required to identify and obtain relevant site information, reports, and data that are necessary for determining site conditions and the level of community concern regarding the cleanup actions. These provisions are necessary to ensure that response actions are performed adequately and are consistent with the law.

Subsections (c)(1) through (7) require the private site manager and private site management team members to prepare every opinion, determination, and decision related to the assessment of a hazardous substance release or potential release by describing the methods, data, and risk assessments that were used to support the findings, determinations, or decisions rendered in any reports, data, or documentation that is submitted to DTSC for review and approval. Private site managers and team members are required to describe any data, assessments, assumptions, qualifications or limitations regarding alternative findings, opinions, determinations or decisions that were considered and rejected.. All documentation must bear the signature, and if appropriate, the stamp of the private site manager and the date the document was signed. These standards are essential because Health and Safety Code section 25395.8 requires DTSC to review and approve or reject all reports or other documentation or provide a written notice describing the deficiencies within a specified time frame. DTSC must be able to make a

determination whether the proposed cleanup action is protective of public health and safety and the environment and understanding all site conditions and the private site manager's decision-making process is necessary to make this determination.

In addition, subsection (d) requires private site managers and private site management team members to immediately notify the project proponent when site conditions or an incident poses an imminent or substantial endangerment to the public health, welfare, or the environment. This notification requirement is necessary to ensure that DTSC may take appropriate action to address an imminent or substantial endangerment that may pose a threat to public health and safety and the environment. Subsection (e) is needed to inform the public and/or applicants that prohibitions are listed in Health and Safety Code section 25395.13.

Section 69002. Preliminary Endangerment Assessment Report: This section is necessary to establish a process for a private site manager to submit a preliminary endangerment assessment (PEA) report to DTSC along with a determination that no further action is required at the site, if appropriate. This regulation is necessary to implement the statutory requirement that the private site manager perform investigations using PEA procedures, which have been approved by DTSC and to incorporate by reference DTSC's PEA Guidance Manual. The PEA Guidance Manual was adopted and approved by DTSC in January 1994, and reprinted in 1999. This regulation also specifies that the private site manager will either agree to pay DTSC's costs for reviewing the PEA report and other documentation or provide a signed statement from the project proponent indicating that the project proponent agrees to pay DTSC's costs. This regulation is necessary to implement Health and Safety Code section 25395.14 that requires the project proponent to fully reimburse DTSC for all reasonable costs incurred by DTSC, including costs associated with the site investigation, cleanup actions, certification, and audit process at the site.

Section 69003. Private Site Management Program Application Package: This section would establish the process for submitting an Application Package to include the cleanup of a site in DTSC's Private Site Management Program. The application package shall include the private site manager's basis for determining the appropriateness of a site's participation in the Private Site Management Program. The determining criteria is listed in Health and Safety Code section 25395.3, subsections (a)(1) through (5). Qualifying sites would be considered low-threat sites. It includes the types of reports, documentation, and information that should be provided or attached to the application regarding professional qualifications of private site management team members, appropriate insurance information, and sufficient information on site conditions.

These regulations are necessary because DTSC must be provided sufficient information to determine if a site is eligible for participation in the Private Site Management Program and if the private site manager has selected qualified team members who possess the statutorily required experience or training to address the conditions at the site, as well as if they possess appropriate insurance.

DTSC must also be provided sufficient information to determine if the site conditions or the proposed cleanup actions may pose a significant environmental impact which would trigger the requirement to prepare an environmental impact report (EIR) under the provisions of the California Environmental Quality Act (CEQA). A site will not automatically be disqualified for participation in this program if an EIR is required. For example, a site may meet the conditions of Health and Safety code section 25395.3, subsection (a), as being appropriate for private site management (including that there is a substantial likelihood that no further significant environmental damage or exposure to humans will occur as the response action is implemented) and still be part of a larger project for which an EIR is required (e.g., because of potential transportation impacts). However, if DTSC determines that an EIR is required because the cleanup actions will result in a significant environmental impact or exposure to humans, DTSC will rescind its approval for a site to participate in the Private Site Management Program. All sites participating in the Private Site Management Program must comply with CEQA requirements as specified in Health and Safety Code section 25395.11. Subsection (g) indicates that certain types of sites that pose or may pose a greater risk to public health and the environment are not eligible to participate in this program.

Section 69004. Insurance Requirements: This section would establish minimum insurance requirements for private site managers. DTSC consulted with the Department of General Services, Office of Risk and Insurance Management to determine what would constitute appropriate insurance as required by Health and Safety Code section 25395.10, subsection (b). This section requires that all private site management insurance policies contain a statement that insurance coverage will not be canceled without providing 120 days prior written notice to the project proponent and DTSC. This cancellation notice is required because if the private site manager or members of the private site management team fail to keep the required insurance coverage, DTSC, as well as the project proponent, must have a way to know that appropriate insurance is not being maintained. DTSC may terminate the private site manager's participation in the Private Site Management Program if the private site manager fails to keep in effect appropriate insurance as specified in the regulations. The types of coverage and monetary limits established by this section are very similar to the requirements that the Department of General Services, Office of Risk and Insurance Management requires from its contractors who provide similar services to those of a private site manager or who provides consulting services or who performs cleanup and remediation services involving hazardous substances or wastes. Section 69004, subsection (h) is provided as an additional protection for the project proponent if new site conditions are identified or if site conditions change that may require more expensive cleanup measures to be taken. Additionally, if the site requires operation and maintenance, project proponents are to provide the required financial assurance pursuant to section 25355.2 of the Health and Safety Code.

Subsection (i) allows the private site manager or team member to provide evidence to DTSC that demonstrates that a contractor/subcontractor is already carrying similar insurance coverage in compliance with the requirements of this section. If DTSC concurs,

the private site manager or team member may be allowed to provide only the portion of the insurance that is not being maintained by the contractor/subcontractor.

Section 69005. Compliance with the California Environmental Quality Act: This section is necessary to provide specific requirements to assure that all site cleanup actions comply with the California Environmental Quality Act (CEQA). This compliance includes providing a 30-day public comment period. The regulations provide the comment periods required to satisfy CEQA and the comment periods necessary to adopt a removal action workplan or a remedial action plan should run concurrently to ensure an efficient and speedy cleanup. If response actions at a site pose a significant environmental impact or exposure to humans, it shall not qualify for participation in the Private Site Management Program.

Section 69006. Project Proponent: This section is necessary to establish minimum requirements for Project Proponents who choose to participate in DTSC's Private Site Management Program. These requirements include: providing private site managers with all site information, entering into an agreement with DTSC, notifying DTSC of any imminent or substantial endangerment conditions at the site, reimbursing DTSC for its costs, and cooperating with DTSC's audit efforts. It also emphasizes the requirement for remaining "Independent" as defined by section 69000.5, subsection (j). As a voluntary program, these minimum requirements ensure that the private site manager, members of the private site management team, the project proponent, and in turn DTSC, comply with the requirements of the Private Site Management Program and the Private Site Management Act. They are designed to ensure that DTSC and the private site manager have all necessary information about the site and that the site is appropriately remediated.

Section 69007. Private Site Management Program Agreement: To participate in the Private Site Management Program, all project proponents must enter into an agreement with DTSC that clearly identifies the procedures, requirements, costs and other associated components of the program as required by the Health and Safety Code. This section would require DTSC to confer with the project proponent and private site managers to facilitate the private site management process. This section would also establish the requirement for DTSC to provide an initial estimate of DTSC's costs and anticipated hours to be spent by DTSC. Due to the voluntary nature of this program the project proponent may choose to either continue to participate in the Private Site Management Program after receipt of the estimate or withdraw from the Program. In addition, the regulations are necessary to ensure that the project proponent is adequately informed of the potential costs associated with the Private Site Management Program.

Section 69008. Guidance Documents: This section is necessary to establish the procedures and conditions under which DTSC will provide an advisory list of technical guidance documents and manuals to private site managers.

Section 69009. Change in Site Conditions or Site Information: This section establishes the requirements for private site managers and private site management team

members to notify DTSC regarding changes in site conditions or site information which is materially different from the facts, data or information used at the time a preliminary endangerment assessment report, removal action workplan, remedial action plan, remedial design, or certification request was prepared. Every site approved for participation in the Private Site Management Program must meet some specific criteria, and if the conditions or site information change, it may change the criteria and therefore the appropriateness of the site to remain in the program. If at any time during the cleanup process any of the conditions or information regarding the site changes, DTSC must be able to determine whether or not the site still qualifies for participation in the Private Site Management Program. The notification requirements in this section are necessary to ensure that only low-risk sites remain in the program.

Section 69010. Material Deviation from Department Approved Report, Work Plan, or Remedial Design: This section would establish notification procedures to be followed if the project proponent, private site manager or private site management team member knows or has reason to believe that an action or decision will materially deviate from a DTSC approved preliminary endangerment assessment report, removal action workplan, remedial action plan, or remedial design. The term “material deviation” is defined in section 69000.5(m) of the proposed regulations. With limited oversight from the State, it is imperative that all project proponents, private site managers, and members of a private site management team take cleanup actions in compliance with DTSC’s approval as specified in Health and Safety Code section 25395.8, subsection (a). This would include the preliminary endangerment assessment report, removal action workplan, remedial action plan or remedial design. This notification is necessary to ensure that all appropriate cleanup actions are taken to address any threats to public health and safety and the environment, and provide the public with an opportunity to review and comment on the proposed changes.

Section 69011. Departmental Review and Approval of Submittals by the Private Site Manager or Private Site Management Team: This section is necessary to establish procedures and time frames that DTSC will use when reviewing preliminary endangerment assessment reports, removal action workplans, and remedial action plans, as well as final remedial designs and certification requests. If DTSC rejects a report or other documentation, it must provide a written report describing the deficiencies and the corrective actions necessary to resolve the problems. Health and Safety Code section 25395.8 specifies that DTSC will conduct timely reviews of all documentation, reports, and designs submitted by the private site manager and members of the private site management team.

This section includes specific requirements applicable to the development of removal action workplans and remedial action plans. These requirements are based upon other statutory provisions and are necessary to ensure that these documents are prepared in accordance with the National Contingency Plan requirements. Health and Safety Code section 25323.1 establishes the requirements that a removal action must be performed in a manner that is protective of the public health and safety and the environment. The

removal action workplan must include a detailed engineering plan for conducting the removal action, a description of the onsite contamination, and the cleanup goals to be achieved by the removal action, and any alternative removal options that were considered and rejected, and the basis for the rejection. In addition to these requirements, a removal action workplan must include components for making the affected community aware of the proposed removal action. These efforts include the preparation of a community profile report to determine the level of community interest, and may include additional efforts to keep the community informed of cleanup actions and to provide opportunities for public comment, which may include conducting a public meeting. As indicated in section 69005 of the proposed regulations, the public review of CEQA documents and the draft removal action workplan shall be held concurrently to ensure an efficient and speedy cleanup of the site.

Health and Safety Code section 25356.1 establishes the requirements for a remedial action plan, which includes among other things, that all remedial action plans must include a statement of reasons setting forth the basis for the removal and remedial actions selected. An evaluation of each proposed alternative remedy and the reasons for rejecting any of the alternative removal and remedial actions is required by Health and Safety Code section 25356.1, subsection (e). Health and Safety Code section 25356.1 also requires that one or more public meetings must be held to provide information about the site and the proposed remedy which would allow the public to address the issues which may concern the affected community. These requirements are necessary to ensure consistency with the National Contingency Plan. As indicated in section 69005 of the proposed regulations, the public review of CEQA documents and the draft remedial action plan shall be held concurrently to ensure an efficient and speedy cleanup of the site.

These proposed regulations require that, prior to issuing a certification pursuant to Health and Safety Code section 25395.8, DTSC shall determine if appropriate land use controls and restrictions have been recorded and run with the land. Land use controls are recorded documents that restrict the present and future uses of the site, including but not limited to, recorded easements, covenants, restrictions, or servitudes, or any combination thereof. Land use controls run with the land from the date of recordation, and bind all of the property owners, their heirs, successors, and assignees, and the agents, employees, and lessees, successors, and their assignees. Pursuant to Health and Safety Code section 25395.8, subsection (b)(4), DTSC shall determine if appropriate land use controls and restrictions are needed at the site to protect public health and safety and the environment, and if so, require that land use controls be properly recorded.

These proposed regulations provide that if a site is selected for an audit, pursuant to Health and Safety Code section 25395.12, DTSC will not approve a certification request until the audit is completed. This provision ensures that once a site has been certified by DTSC, it will not be subject to further reopening by DTSC except as specified. This provision is necessary to clarify the circumstances under which DTSC can require further site investigation and remedial actions in order to prevent any risk to human health and

safety or to the environment.

Section 69012. Department Audits: This section would require the project proponent, private site managers, and private site management team members to provide DTSC with complete access to information, records, technical data, reports, sampling data, photographs, maps, and files related to a cleanup action. By providing all of the required information, DTSC is able to verify that every participant involved in the site have completed all the necessary steps, and required documentation to meet the minimum performance standards. This includes an analysis of the scope, problem and necessary procedures to achieve a certified cleanup. DTSC is required by Health and Safety Code section 25395.12 to audit a minimum of 25% of the sites where a private site manager or members of a private site management team have conducted site investigations or cleanup actions with minimum DTSC oversight and where DTSC has issued a certificate of completion. By performing audits when certification requests are received, the requirements included in this section facilitate timely verification and completion of site cleanups thereby ensuring that site cleanups conducted pursuant to this program are protective of public health and safety and the environment. The requirement that audits be completed within 45 working days of sending the audit notification to the project proponent ensures that DTSC audits will be conducted in an efficient and speedy manner, in keeping with the statute.

It is essential to keep these records for ten years or more because operation and maintenance activities at some sites may last more than ten years, and the records may be necessary to evaluate the adequacy of the cleanup in the future. Health and Safety Code section 25395.12, subsection (c) also requires DTSC to notify OEHHA whenever it finds that a private site manager or a private site management team has failed to comply with these proposed performance standards, so that OEHHA may take appropriate action such as rescinding a private site manager's registration as an Registered Environmental Assessor-Class II.

Section 69013. Withdrawal of Department Approval: This section would allow DTSC to rescind its approval of a Private Site Management Program application if a project proponent, a private site manager, or member of a private site management team fails to meet the requirements of chapter 6.8 or chapter 6.85 of division 20 of the Health and Safety Code. This program is a voluntary program with a lower level of State oversight. These rescission rights are necessary to ensure that the private site managers and private site management team members conduct cleanups that protect the public health and the environment and that are consistent with the National Contingency Plan.